CLLS Power System Sdn Bhd (No 2) v Sara Timur Sdn Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22C-65–11 OF 2014
MARY LIM J
3 MARCH 2015

Civil Procedure — Summary judgment — Application for — Whether procedural requirements complied with — Whether prima facie case established by plaintiff — Whether defendant had raised issue meriting trial — Whether no need for hearing of viva voce evidence

Contract — Breach — Contract for supply of equipment — Claim for works completed — Whether claim could only be made after all equipment delivered to site — Whether non-delivery of equipment to site due to defendant's own failure — Whether unconditional part-payments made by defendant amounted to admission of existence of debt

The plaintiff was in the business of selling engineering equipment and products. The defendant was the main contractor of a construction project ('the project'). The defendant appointed the plaintiff as a nominated sub-contractor to supply, deliver, install, test and commission and maintain genset installation services for the project for the sum of RM20.5m ('the contract'). The defendant paid the plaintiff a sum of RM2m as down-payment. The plaintiff claimed that it had carried out works and had issued progress claims totaling RM14,644,647.95. The progress claims were submitted to the project's mechanical and electrical engineer and the architect who certified the value of the plaintiff's works as RM16,336,972.15. In view of the down-payment and a subsequent payment of RM550,000, the plaintiff commenced the present suit claiming the balance sum of RM13,786,972.15. The defendant claimed that the plaintiff was supposed to complete the work by 22 February 2012 and had failed to do so. Further, the defendant contended that the plaintiff could only claim for the second stage of payment, that was 70% of the contract price, after all the required materials had been delivered to the site. In respect of the payment of RM550,000, the defendant claimed that this payment was made merely to comfort the plaintiff and that the payment could not be treated as an admission or a waiver of the defendant's rights. The plaintiff applied for summary judgment of the claim.

Held, allowing the plaintiff's claim with costs of RM5,000:

(1) The application for summary judgment was properly made before the court having complied with all procedural requirements as set out in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 (see para 10).

(2) A prima facie case had been established by the plaintiff and the defendant's burden of showing why an order for summary judgment ought not to be entered against the defendant had not been discharged. The defendant had failed to raise any issue meriting trial. This was a case eminently suitable for the entry of judgment summarily, and there was no need for the hearing of viva voce evidence in any of the respects raised by the defendant. The sum claimed by the plaintiff was indeed due and owing by the defendant (see para 10).

(3) The defendant made three payments totaling RM550,000. Each time the defendant paid, it did so without complaint, without hesitation; with no conditions, no protest and no reservation. Having kept quiet and having lulled the plaintiff into the belief that the debt was not disputed, the defendant could not now claim otherwise. The unhesitating and unequivocal payments against the backdrop of documents showed that the defendant had, by its actions and conduct, admitted the existence of the debt owing to the plaintiff. Hence, the matters raised now were but mere afterthoughts (see para 13).

(4) Given that the second payment was 'upon delivery to site before installation', it must include payment for the equipment which were ready for delivery to the site but were not delivered because the defendant's site was not ready to receive the same. Such payment which was the subject of the plaintiff's claim was not dependent on delivery and installation of all equipment as suggested by the defendant. Since the consultants were satisfied that the payments were due, the defendant's argument that payment was dependent on full delivery was not tenable as an issue meriting full trial (see para 28).

(5) The non-delivery of the remaining gensets to the site were due to the defendant's own failure. The completion date of the project was extended several times upon the request of the defendant. Despite the extensions of time, the defendant could not get the site ready for the plaintiff to complete its works. Hence, the defendant could not be allowed to take advantage of that situation and deny liability for the same (see para 29).

[Bahasa Malaysia summary

Plaintif menjalankan perniagaan menjual peralatan dan produk kejuruteraan. Defendan merupakan kontraktor utama dalam satu projek pembinaan ('projek'). Defendan dilantik oleh plaintif sebagai sub-kontraktor yang dicadangkan untuk membekal, menghantar, memasang, menguji dan mengkomisen dan memberi perkhidmatan menyelenggara pemasangan genset untuk projek bagi projek yang berjumlah RM20.5m ('kontrak'). Defendan membayar RM2 juta kepada plaintif sebagai bayaran pendahuluan. Plaintif mendakwa bahawa ia telah menjalankan kerja-kerja tersebut dan telah mengeluarkan tuntutan progresif berjumlah RM14,644,647.95. Tuntutan progresif telah dikemukakan kepada jurutera mekanikal dan elektrik dan arkitek projek yang mengesahkan bahawa kerja-kerja plaintif bernilai sebanyak RM16,336,972.15. Melihatkan pada wang pendahuluan dan bayaran terkemudian iaitu RM550,000, plaintif telah memulakan guaman ini dengan menuntut jumlah baki sebanyak RM13,786,972.15. Defendan mendakwa bahawa plaintif sepatutnya menyempurnakan kerja-kerja tersebut pada 22 Februari 2012 dan gagal berbuat demikian. Selanjutnya, defendan menghujahkan bahawa plaintif hanya boleh membuat tuntutan bagi peringkat kedua pembayaran, yang merupakan 70% daripada harga kontrak, selepas kesemua bahan-bahan yang diperlukan telah dihantar ke tapak tersebut. Berkenaan pembayaran RM550,000, defendan mendakwa bahawa bayaran ini telah dibuat semata-mata bagi keselesaan plaintif dan bahawa bayaran tersebut tidak boleh dianggap sebagai pengakuan atau penafian hak-hak defendan. Plaintif memohon penghakiman terus bagi tuntutan ini.

Diputuskan, membenarkan tuntutan plaintif dengan kos sebanyak RM5,000:

(1) Permohonan penghakiman terus dibuat dengan teratur di mahkamah kerana telah mematuhi kesemua keperluan prosedur seperti yang dinyatakan dalam kes *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685 (lihat perenggan 10).

(2) Satu kes prima facie telah dibuktikan oleh plaintif dan beban defendan untuk menunjukkan mengapa satu perintah untuk penghakiman tidak patut dimasukkan terhadap defendan belum dilepaskan. Defendan gagal menimbulkan apa-apa perbicaraan isu yang mewajarkan perbicaraan. Ini merupakan kes yang nyata sesuai bagi penghakiman terus, dan tiada keperluan perbicaraan keterangan *viva voce* dalam mana-mana hal yang dibangkitkan oleh defendan. Jumlah yang dituntut oleh plaintif sememangnya terhutang dan perlu dibayar oleh defendan (lihat perenggan 10).

(3) Defendan membuat tiga pembayaran berjumlah RM550,000. Setiap kali defendan membuat bayaran, ia dibuat tanpa aduan, tanpa teragak-agak; tanpa syarat, tanpa protes mahupun dalihan. Setelah diam dan membuatkan plaintif percaya bahawa hutang tersebut tidak dipertikaikan, defendan kini tidak boleh mendakwa sebaliknya.

Pembayaran yang tidak teragak-agak dan tidak berbelah bahagi berdasarkan dokumen-dokumen menunjukkan bahawa defendan telah, melalui tindakan dan perbuatannya, mengakui kewujudan hutang yang terhutang terhadap plaintif. Oleh itu, hal-hal perkara yang dibangkitkan kini hanyalah sesuatu yang difikirkan kemudian (lihat perenggan 13).

(4) Sekiranya bayaran kedua adalah 'semasa penghantaran ke tapak sebelum pemasangan', ia mesti disertai oleh bayaran bagi peralatan yang sedia untuk penghantaran ke tapak tetapi ia tidak dihantar kerana tapak defendan belum bersedia untuk menerimanya. Pembayaran sedemikian yang menjadi subjek tuntutan plaintif tidak bergantung pada penghantaran dan pemasangan semua peralatan seperti yang dicadangkan oleh defendan. Oleh kerana perunding-perunding berpuas hati bahawa bayaran tertunggak, hujahan defendan bahawa pembayaran bergantung pada penghantaran penuh tidak dapat dipertahankan sebagai isu yang mewajarkan perbicaraan penuh (lihat perenggan 28).

(5) Kegagalan menghantar baki genset ke tapak adalah disebabkan oleh kegagalan defendan sendiri. Tarikh penyiapan projek ini dilanjutkan beberapa kali atas permintaan defendan. Walaupun terdapat lanjutan masa, defendan tidak boleh memastikan tapak siap sedia agar plaintif boleh menyempurnakan kerja-kerjanya. Oleh itu, defendan tidak boleh dibenarkan untuk mengambil kesempatan daripada keadaan itu dan menafikan liabiliti terhadapnya (lihat perenggan 29).]]]]]]]

Notes

For cases on application for summary judgment, see 2(5) *Mallal's Digest* (5th Ed, 2015) paras 9344–9421.

For cases on breach in general, see 3(3) *Mallal's Digest* (5th Ed, 2015) paras 3443–3865.

Cases referred to

Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor [2006] 2 MLJ 685; [2006] 3 CLJ 544, FC (refd)

KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd [1996] 1 MLJ 233, CA (refd)

Conrad Young (Tan Shang Neng with him) (Sreenevasan Young) for the plaintiff.
Heng Yee Keat (Christopher & Lee Ong) for the defendant.

Mary Lim J:

[1] This is an application for summary judgment (encl 21). The affidavit in support can be found at encl 20 whereas the defendant's affidavit-in-reply can be found at encl 27 to which the plaintiff had replied by way of a second affidavit found at encl 28. The facts of the claim are as follow.

[2] The plaintiff is in the business of selling, marketing and distributing marine and industrial engines, generators and other engineering equipment and products. The defendant is the main contractor of a project known as 'Cadangan Membina dan Menyiapkan: (A) 1 Blok Pusat Data 3 Tingkat, (B) 1 Blok M & E 3 Tingkat, 1 Unit SSU (Stesen Suis Utama) di atas Lot PT 29470 dan PT 29471, 71760 Bandar Techpark @ Enstek, Mukim Labu, Daerah Seremban, Negeri Sembilan Darul Khususuntuk Tetuan Teliti Datacentres Sdn Bhd' ('the project'). The employer of the project is Teliti Datacentres Sdn Bhd.

[3] By way of letter dated 1 November 2011, the defendant appointed the plaintiff as a nominated sub-contractor to supply, deliver, install, test and commission and maintain genset installation services for the project for the sum of RM20.5m ('the contract'). Around 16 December 2011, the defendant paid the plaintiff a sum of RM2m as down-payment.

[4] Pursuant to the contract, the plaintiff claimed that it had carried out works and had issued progress claims totaling RM14,644,647.95. The progress claims were submitted to the project's mechanical and electrical engineer, Perunding Eagles Engineers Sdn Bhd and the architect, Arkitek Pital for the certification of the value of work done.

[5] As at 16 October 2012, Perunding Eagles and Arkitek Pital certified the value of the plaintiff's works as RM16,336,972.15. In view of the down-payment and a subsequent payment of RM550,000. The plaintiff claimed that a balance sum of RM13,786,972.15 is now due and outstanding from the defendant. The present claim is for that balance sum.

[6] In defence and in its affidavit-in-reply, the defendant claimed that the payment of the contract sum of RM20.5m would be in the following stages; namely, 10% as down payment; 70% upon delivery of all the materials to site before installation; 15% after installation; and 5% after testing and commissioning. It was the defendant's case that the plaintiff who was supposed to complete the work by 22 February 2012 had failed and/or neglected to complete the work by that agreed completion date; or at all.

[7] Further, the defendant contended that the plaintiff was not entitled to make any progress claim or offsite claim. It was the defendant's contention that the plaintiff could only claim for the second stage of payment, that is, the 70% of the contract price after all the required materials had been delivered to the site. A list of the required materials was then attached to the defence as 'Annexure A'. The defendant claimed that under the contract (see Annexure A), the plaintiff was obliged to deliver eight generators to the site. However, the plaintiff had only delivered four generators together with six silencers and eight attenuators to the site. As such, the plaintiff was not entitled to make a claim for the second stage of payment; the sum of RM14,350,000.

[8] As for the matter of certification, the defendant claimed that it was the only person that could certify the value of work done by the plaintiff. That being the case, the certificates issued by Perunding Eagle and Arkitek Pital were not binding on the defendant. In any case, those certificates were said to be 'ambiguous and/or wrong'.

[9] In respect of the payment of RM550,000, the defendant claimed that this payment was made 'merely to comfort the plaintiff, as the plaintiff had at that time delivered some materials (but not all the required material) to the site'. Such payment therefore could not be treated as an admission or a waiver of the defendant's rights. The defendant thereby claimed that the plaintiff's claim was premature.

[10] After hearing submissions and upon careful consideration of those submissions against the documents and pleadings before the court, the court agreed with the plaintiff. The court was satisfied that the application for summary judgment is properly before the court having complied with all procedural requirements as set out in *Cempaka Finance Bhd v Ho Lai Ying (trading as KH Trading) & Anor* [2006] 2 MLJ 685; [2006] 3 CLJ 544. The court was further satisfied that a prima facie case had been established by the plaintiff and that the defendant's burden of showing why an order for summary judgment ought not to be entered against the defendant had not been discharged. The defendant had failed to raise any issue meriting trial. The court was also satisfied that this was a case eminently suitable for the entry of judgment summarily, and that there was no need for the hearing of viva voce evidence in any of the respects raised by the defendant. The sum claimed by the plaintiff is indeed due and owing by the defendant. Judgment was accordingly entered as per para 11 of the statement of claim together with interest at the rate of 5%pa from the date of judgment to the date of realisation together with costs of RM5,000. The defendant has since appealed.

[11] I shall address each of the issues raised by the defendant in opposing this application.

[12] Dealing first with the matter of admission. The defendant's case is that the payments totaling the sum of RM550,000 were 'merely to comfort the plaintiff', 'a gesture of goodwill' and are not to be regarded as an admission by the defendant of the plaintiff's claim. The plaintiff's responded by submitting that this is really an afterthought as the payments were entirely without dispute as to the sum due and owing; without reservation, without protest, and without condition.The plaintiff relied on the Court of Appeal's decision in *KGN Jaya Sdn Bhd v Pan Reliance Sdn Bhd* [1996] 1 MLJ 233 where the appellant had disputed the respondent's application for summary judgment on the basis that the existence of an agency agreement was challenged. In upholding the High Court's decision granting summary judgment, the Court of Appeal said at p 237:

> ... a party may, by his conduct in all the circumstances of a particular case, be estopped from asserting the absence of an agency relationship between him and he who claims to be his principal.
>
> Viewed in this way, we perceive that the key to the whole case lies in the conduct of the appellant in this case, Encik Darshan Singh, in response to a question put to him by a member of the panel hearing this appeal, frankly conceded that his client did indeed receive the statements of the accounts of which we have earlier spoken. It follows that a reasonable man similarly circumstanced as the appellant would, if it were really true that there had been no appointment of sub-agency as later claimed by it, have, post haste sent these accounts back to the respondent and denied any liability.
>
> But that is not what happened. The appellant remained silent, held onto the accounts, and did nothing about it. The denial by its solicitor's letter of 4 January 1993, came long after the delivery of the account.
>
> When asked why his client had kept silent for a rather long period of time, Encik Darshan Singh's response was that his client was a large company and did not do anything until the letter before action was received. We trust that we will be forgiven if we are unable to detect the logic in this response.
>
> We are of the view that it would be a travesty of justice if we were to accede to the appellant's arguments. We are left in no doubt that the undisputed facts of this case admit of the conclusion that the respondent was, by the conduct of the appellant, lulled into the belief that the appellant had no challenge to the accounts, leave alone the legal relationship between the parties.

> To put it another way, the appellant, by its silence coupled with the other circumstances of the case, encouraged the respondent to believe that it intended to raise no challenge to the existence of a prior legal relation between the parties or to the figure which the account showed as owing by it. Having done so, it ought not to be permitted to now contend otherwise.
>
> It follows that it does not, therefore, lie in the mouth of the appellant to now deny the respondent's claim. It would be plainly inequitable to do so. An examination of the facts leads us to this conclusion. The legal basis upon which such a conclusion may be sustained is well-settled and is now beyond question. See *Boustead Trading (1985) Sdn Bhd v Arab-Malaysian Merchant Bank Bhd* [1995] 3 MLJ 331.

[13] I agree with the plaintiff that the facts and the conduct of the defendant are even stronger than those in KGN Jaya Sdn Bhd not only did the defendant keep quiet, it made three payments totaling RM550,000. Each time the defendant paid, it did so without complaint, without hesitation; with no conditions, no protest and no reservation. Having kept quiet and having 'lulled' the plaintiff into the belief that the debt is not disputed, it does not now 'lie in the mouth of the' defendant to claim otherwise. A quick examination of the documents cited bears this out.

[14] The plaintiff first relies on the certificate of payment No 20A which was issued by the defendant's employer, Teliti Datacentre Sdn Bhd ('Teliti'). In that certificate, Teliti had certified that total value of works done by the defendant as at 16 October 2012 to be RM171,538,794.21. That sum included the value of works completed by the plaintiff as RM16,336,972.15 (exh 'QKH – 2'). Because the defendant had paid a deposit of RM2m on 16 Dcember 2011, the balance was RM14,336,972.15.

[15] After the plaintiff's solicitors' letter of demand on 16 April 2013, the parties met on 17 April 2013. The plaintiff's solicitors followed up on this meeting by seeking the first tranche of payment by 15 May 2013 in its letter dated 2 May 2013 (exh 'QKH – 4'). In this letter, 'both parties have reached the following consensus', that is:

(1) that the sum of RM14,336,972.15 remains a sum due and owing from you to our client ('the Sum Due');

(2) that you will pay the sum of RM800,000.00 by 15.5.2013 towards the Sum Due;

(3) that you will pay the sum of RM3,000,000.00 by 15.6.2013 towards the Sum Due; and

(4) that the balance of RM10,536,972.15 shall be paid in due course.

[16] This was the response of the defendant as found in its letter of even date (exh 'QKH – 5'); the letter was signed by its senior vice president, James Lees who also deposed the affidavit-in-reply for the defendant:

> Our ref: ST/KL/565/12/0288
>
> 2nd May 2013
>
> SREENEVASAN YOUNG
>
> J-3A-13 Solaris Mont Kiara
>
> No 2 Jalan Solaris
>
> 50480 Kuala Kumpur
>
> Attn: Mr Leong Phaik Leng
>
> Dear Sir,
>
> PROPOSED CONSTRUCTION OF 3 STOREY DATA CENTRE BLOCK AND 3 STOREY M&E BLOCK TO TELITI DATA CENTRE ON LOT NO PT29470 AND PT 29471, TECHPARK @ BANDAR ENSTEK, NEGERI SEMBILAN DARUL KHUSUS FOR M/S TELITI DATACENTRES SDN BHD
>
> - Balance outstanding
>
> We refer to your letter ref: SY.13.0691.2012 dated 2nd May 2013 and would comment as follows.
>
> The meeting did not agree on any precise sums to be paid, but it was agreed that on or before the 15th May 2013 a sum of between Two and Three Hundred Thousand Ringgit would be paid by Sara-Timur.
>
> In addition Mr Loi of Sara-Timur stated that he believed that by the 15th June 2013 Sara-Timur may be in a position to pay a further One to Two Million Ringgit to CLLS but stated that this would be subject to developments which were explained in detail at the meeting.
>
> Thank you.
>
> Yours faithfully
>
> For SARA-TIMUR SDN BHD
>
> -signed-
>
> JAMES LEES
>
> Senior Vice President

[17] By email dated 8 May 2013 sent by the plaintiff's managing director, Lau Huan Yeong to James Lees captioned 'Outstanding debt owed by Sara-Timur Sdn Bhd to CLLS Power System Sdn Bhd', the plaintiff once again referred to the meeting between the parties on 17 April 2013. Mr Lau stated

that:

From: Huan Yeong Lau

Sent: Wednesday, 8 May, 2013 2:04 PM

To: james.lees@sara-timur.com

Cc: Eng Hua Kuah; Benjamin Quah; phaikleng@Sreeneyoung.com; john.loi@sara-timur.com

Subject: Outstanding debt owed by Sara-Timur Sdn Bhd to CLLS Power SysemSdnBhd

Importance: High

Dear Mr Lees:

We refer to our meeting on Wednesday 17th April 2013 at your office together with your colleague, Mr John Loi, Managing Director of Sara-Timur Sdn Bhd.

During the meeting you and your colleague had made a genuine offer to reduce the debt owing to our company with a payment of a few hundred thousand ringgit by the 15th May 2013.

We most welcome and appreciate your gesture to reduce the long outstanding debt to us, no doubt even though it is only partial.

However we are still owing our suppliers whom we have purchased goods and services that was supplied to you for substantial sums that is also overdue and long standing. Currently we have to settle two invoices from two of such suppliers for sums amounting to RM227,250 and RM297,600 (RM524,850 in total) by 18th May 2013. Hence we would appreciate if your payment to us by the 15th of May would at least cover this amount of RM524,850 that is due to them.

We are extremely concerned that these suppliers may take legal action against us if we should further delay payments to them for our outstanding debt. In such event we may be left with no alternative but to initiate legal action against your company to recover our debt and protect our interest.

Hence we cannot over emphasize the importance of your payment of RM524,850 to us on or before 15th May 2013.

Thank you for your attention and await your favourable reply.

Yours sincerely,

Lau HuanYeong

Managing Director

CLLS Power System Sdn Bhd

[18] What follows next is important and relevant. There was a payment of RM300,000 paid vide Maybank cheque No 730282 and dated 14 May 2013. This payment was accepted by the plaintiff who also instructed its solicitors to

inform the defendant that the plaintiff was 'currently waiting for a further sum to be paid by 15 June 2013'; that the defendant 'pay at least the sum of RM2,000,000 by 15 June 2013'; and that it informed the plaintiff 'know how you would propose to settle the balance outstanding due and owing' – see solicitor's letter dated 29 May 2013 at exh 'QKH – 7'.

[19] This was the defendant's response to that letter on 7 June 2013 (exh 'QKH – 8'):

> Our ref: ST/KL/565/13/297
>
> 7th June 2013
>
> SREENEVASAN YOUNG
>
> J-3A-13 Solaris Mont Kiara
>
> No 2 Jalan Solaris
>
> 50480 Kuala Kumpur
>
> Attn: Mr Leong Phaik Leng
>
> Dear Sir,
>
> PROPOSED CONSTRUCTION OF 3 STOREY DATA CENTRE BLOCK AND 3 STOREY M&E BLOCK TO TELITI DATA CENTRE ON LOT NO. PT 29470 AND PT 29471, TECHPARK @ BANDAR ENSTEK, NEGERI SEMBILAN DARUL KHUSUS FOR M/S TELITI DATACENTRES SDN BHD
>
> - Balance Outstanding
>
> We are in receipt of your letter ref: SY.13.0691.2012 dated 29th May 2013 and would comment as follows.
>
> Your client is well aware of the situation regarding payment of monies from our client MessrsTelitiDatacentres Ltd as we explained this in detail and confidence at our meeting on the 17th April 2013.
>
> At that meeting our Managing Director Mr John Loi agreed to pay a few hundred thousand by the 15th May 2013, this has been done.
>
> However the payment of the next tract of RM1-2 million were dependent upon circumstances which were made know to your client and not a specific agreement to make payment as you seem to be implying in your letter.
>
> We will endeavor to make further payment but as told to your clients this will depend upon circumstances of which they are well aware.
>
> Thank you.
>
> Yours faithfully
>
> For SARA-TIMUR SDN BHD

-signed-

JAMES LEES

Senior Vice President

[20] After writing this letter, the defendant made two further payments; a sum of RM200,000 on 8 July 2013 and a sum of RM50,000, on 5 September 2013. Not only did the defendant tell the plaintiff that it was agreed at the meeting of 17 April 2013 *'that on or before the 15th May 2013 a sum of between two and three hundred thousand ringgit would be paid by Sara-Timur'; the defendant repeated this in its subsequent letter dated 7 June 2013 that 'At that meeting our managing director Mr John Loi agreed to pay a few hundred thousand by the 15 May 2013'; James Lees added that 'this has been done'. Although Mr Lees said that 'the payment of the next tract of RM1-2m were dependent upon circumstances which were made known to your client and not a specific agreement to make payment as you seem to be implying in your letter'; he nevertheless concluded his letter by saying that 'We will endeavour to make further payment'*. The defendant did go on to make two more payments.

[21] Such unhesitating and unequivocal payments against that backdrop of documents, especially Teliti's certificate of payment No 20A, confirms the plaintiff's contention that the defendant had, by its actions and conduct, admitted the existence of the debt owing to the plaintiff. Not only did the defendant admit the existence of the debt due to the plaintiff, it partially paid off that debt through payments which were both unconditional and unreserved. Such actions and conduct can only reflect what the plaintiff claims: that the defendant had admitted to its claim; and that the matters raise now are but mere afterthoughts; raise long after payments had been made. The defendant's actions speak volumes and the court should not turn a deaf ear to the clear implications of those actions, that the defendant had no quarrel with the plaintiff's demand for payment of a debt then as it now seeks to do, after the claim was filed. This course of action or conduct, in my regard, illustrates admission as opposed to payments merely to comfort the plaintiff.

[22] These clear and unequivocal conditions and circumstances which have encouraged the plaintiff to believe that there was no challenge as to its claim must bind the defendant. The defendant must not be permitted to now deny the plaintiff's claims. The plaintiff cannot be allowed to renege and say that the payments were 'merely to comfort the plaintiff' and 'a gesture of goodwill'. With respect, the argument is unreasonable and it would be futile if not a waste of precious time and resources of all concerned that such an issue is considered as one of merit when it is clearly not.

[23] On such ground alone, judgment can be summarily entered against the

defendant. For the sake of completeness, the court will proceed to consider the other issues raise which the court equally finds to be of no merit.

[24] Dealing next with the matter of the plaintiff's entitlement to the claim. Reminding ourselves that the defendant's point here is that payment of the contract sum of RM20.5m is in stages: 10% as down payment; 70% upon delivery of all the materials to site before installation; 15% after installation; and 5% after testing and commissioning, the defendant's argument is that the plaintiff's entitlement to the second stage payment is dependent on the plaintiff having completed the works by delivering 'all' materials to the site. According to the defendant, because the plaintiff failed to complete the work by 22 February 2012, it is not entitled to this second stage of payments.

[25] Having examined the relevant provisions of the contract and the other related document, the court disagrees.

[26] First and foremost, the works awarded to the plaintiff was a contract to 'supply, deliver, install, test, commission, and maintain' a system provided by the plaintiff. The works are further described in cl 1 of the contract as 'genset installation services' for a fixed lump sum amount of RM20.5m 'made up' of the five items; namely preliminaries, 11kV genset installation equipments, electrical works, mechanical works and contingency sum.

[27] The payment terms for the 'genset installation services' are set out at cl 8 of the letter of award and it reads:

> Payment Terms and Retention Sum
>
> The payment term shall be 10% down payment, 70% upon delivery to site before installation, 15% after installation and 5% after Test and Commissioning.
>
> CLLS Power System Sdn Bhd shall provide an equivalent amount of Bank Guarantee which is valid for the duration up to the end of Defect Liability Period ie 24 months from the date of issuance of the Certificate of Practical Completion to exchange with the final 5% payment.

[28] The contract clearly provided that the payment of the contract sum was simply to be in the manner as found in cl 8. Given that the second payment is 'upon delivery to site before installation', it must include payment for the equipment which were ready for delivery to the site but are not delivered because the defendant's site was not ready to receive the same. Such payment which is the subject of the plaintiff's claim is not dependent on delivery and installation of all materials (equipment) as suggested by the defendant. Since the consultants or the project's architect and mechanical and electrical engineer are satisfied that the payments are due and that extends to Teliti and that is evidenced by their certifications, the defendant's argument that payment is

dependent on full delivery is not tenable as an issue meriting full trial. Put another way, the consultants have not rejected the plaintiff's progress claim for the second stage, nor have they said that the second stage of payment of 70% is not due until and unless all materials have been delivered to the site.

[29] In any case, the court agrees with the plaintiff that the non-delivery of the remaining gensets to the site were due to the defendant's own failure. It is not in dispute that the completion date of the project was extended several times upon the request of the defendant. Despite the extensions of time given by Teliti, the defendant could not get the site ready for the plaintiff to complete its works. Under such circumstances, the defendant cannot be allowed to take advantage of that situation and deny liability for the same.

[30] As a corollary to this issue is the matter of the works being done off site or that there were offsite claims by the plaintiff. Again, I do not find this an issue of merit since Teliti and the consultants had accepted and certified the plaintiff's claims including those completed offsite.

[31] Moving on to the matter of certification. The issue raise is that the certification must be by the defendant and not the consultants or the project's architect and mechanical and electrical engineer. If the certificates were issued by such consultants, then these certificates are not binding on the defendant.

[32] With respect, the court again disagrees with the defendant. There is no provision or agreed term in the contract to this effect as suggested by the defendant.

[33] Furthermore, the court observes that the defendant has sought to rely on certificate of payment No 25 I am aware that the plaintiff has serious reservations about this certificate. However, accepting for a moment that this is a valid certificate, I notice that this certificate, produced by the defendant is similarly certified or carries the signature of the project's architect, Arkitek Pital – see exh 'C' in encl 27. I, therefore, also do not find this issue of merit or bona fide.

[34] The court therefore does not find any of the issues raised by the defendant to be either real bona fide issues or issue(s) of merit. Judgment is accordingly entered for the orders sought in para 11 of the statement of claim together with interest at the rate of 5%pa from the date of judgment to the date of realisation together with costs of RM5,000.

Plaintiff's claim allowed with costs of RM5,000.

Reported by Kanesh Sundrum